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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, ETC., AND BLALOCK MOTOR EXPRESS, INC., APPELLANTS,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, ET AL., ETC.

OBJECTIONS TO THE JURISDICTION, WITH MOTION TO DISMISS OR AFFIRM.

JOHN M. DANIEL,
Attorney General of South Carolina,
IRVINE F. BELSER,
Special Counsel,
Counsel for Appellees.

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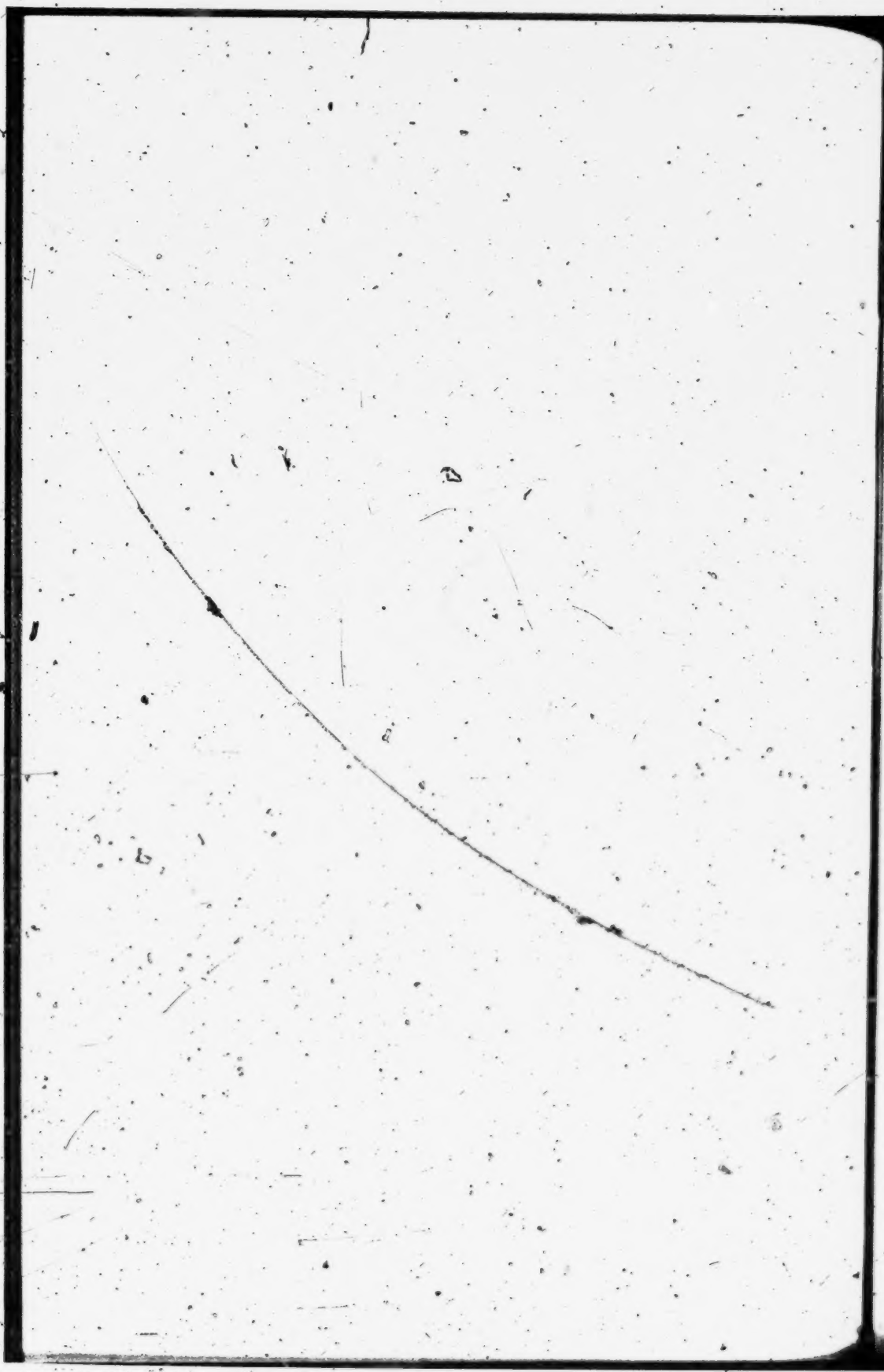

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 94

M. D. HICKLIN, INDIVIDUALLY AND AS A REPRESENTATIVE OF CLASS "F" CARRIERS WITHIN THE PROVISIONS OF SECTIONS 8507-8530 OF CHAPTER 162 OF THE SOUTH CAROLINA CODE OF 1932, WHO ARE, OR CLAIM TO BE, ENGAGED IN INTERSTATE COMMERCE, AS WELL AS INTRASTATE OPERATIONS WITHIN THE STATE OF SOUTH CAROLINA, APPELLANT,

vs.

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, J. H. NANCE, THOMAS H. TATUM, J. A. BEAMGUARD, AND B. J. PEARMAN, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA, APPELLEES.

OBJECTIONS TO THE JURISDICTION, WITH MOTION TO DISMISS OR AFFIRM.

Come now the appellees in the above case and file the following objections to the jurisdiction, together with motion to dismiss the appeal or affirm the judgment:

Statement of Grounds of Objection to the Jurisdiction.

I.

The Blalock Motor Express, Inc., in whose favor an appeal was allowed provided a $500 bond was filed, has failed to file the said appeal bond, and this appeal is now being prosecuted wholly by the appellant, M. D. Hicklin. Hence, the appeal by the Blalock Motor Express, Inc., together with the assignments of error (4) and points particularly relating thereto should be disregarded.

II.

The appellant has failed to comply with this Court's Rule 12, Section 1, requiring the filing of a statement giving particularly the points to be relied upon to sustain the jurisdiction.

The appellant in this case has filed two statements along this line, one entitled "Statement as to Jurisdiction of Court", and thereafter another paper served on May 23, 1933, purporting to designate the points to be relied upon. It is submitted, however, that neither paper adequately or sufficiently complies with this Court's said rule or the purpose thereof.

Points 1, 2 and 3 contained in the statement of points dated May 23, 1933, fail to specify particularly what sections of the Act in question are alleged to be unconstitutional, and wherein or how the said Act violates the provisions of the United States Constitution therein mentioned.

The South Carolina Motor Regulatory Act, as embodied in the South Carolina Code of 1932, pp. 954-962, consists of eighteen different sections comprising eight printed pages, and it is impossible for the Court or counsel to tell from the generality of these points what are the particular

sections to which exception is taken. Moreover, the Act itself provides (Sec. 8521) that if any section or portion thereof should be held to be unconstitutional, such decision should not affect the validity of the remaining portions of the Act.

As to the remaining points, 4, 5 and 6, point 4 relates solely to the questions involved in the Blalock Motor Express, Inc., appeal which has been abandoned, and not to the appeal in this case, and point 5(*a*) is subject to the objections hereinabove stated with regard to points 1, 2 and 3, and point 5(*c*) seeks to raise an issue which was not raised in the answer filed in the case or in the argument before the South Carolina Supreme Court, or in any of the assignments of error.

Point 6 is merely a general statement and does not specify particularly any errors on the part of the Supreme Court of South Carolina.

Statement of Grounds of Motion to Affirm.

In any event it is submitted that the appellant's grounds of appeal are so unsubstantial that the judgment of the South Carolina Supreme Court should be affirmed without further hearing.

I.

The most seriously pressed question raised by the appellant before the South Carolina Supreme Court was that the said Act was unconstitutional by reason of the exemption contained in Section 8508 of the Act in favor of "farmers or dairymen hauling dairy or farm products".

It is submitted, however, that the Supreme Court of South Carolina was fully justified by reason of the recent decisions of this Honorable Court in holding that said exemption did not render the Act unconstitutional.

Stephenson v. *Binford,* 77 L. ed. 203, — U. S. —;
Baking Company v. *Woodring,* 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816;
Buck v. *Kuykendall,* 267 U. S. 307, 69 L. ed. 623;
Packard v. *Banton,* 264 U. S. 140, 68 L. ed. 596;
Sproles v. *Binford,* 286 U. S. 374, 76 L. ed. 827;
Cf. *Smith* v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264.

The record in this case established that farmers and/or dairymen used the highways of the State only seasonally, during the harvest seasons of the year, that is during a few summer months and a few fall months, and that the use made by them is very light and insignificant as compared with the use made by appellant and others in like situation, operating fleets of large and heavy trucks from one end of the State to the other. It was also established that the Railroad Commission, which was charged with the duty of enforcing the Act, construed the exemption as running in favor only of farmers and dairymen whose principal business was farming and dairying and not in favor of farmers or dairymen who made a regular business of transport hauling for others. (See Reply and Affidavit of W. W. Goodman.)

> "It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the Legislature may prohibit or condition as it sees fit. *Packard* v. *Banton,* 264 U. S. 140, 144, 68 L. ed. 596, 607, 44 S. Ct. 257, and cases cited; *Frost & F. Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, 592, 593, 70 L. ed. 1101, 1104, 1105, 47 A. L. R. 457, 46 S. Ct. 605; *Hodge-Drive-It-Yourself Co.* v. *Cincinnati,* 284 U. S. 335, 337, 76 L. ed. 323, 326, 52 S. Ct. 144; *Johnson Transfer & Freight Lines* v.

Perry (D. C.) 47 F. (2d) 900, 902; *Southern Motorways* v. *Perry*, (D. C.) 39 F. (2d) 145, 147; *People's Transit Co.* v. *Henshaw* (C. C. A. 8th) 20 F. (2d) 87, 89; *Weksler* v. *Collins*, 317 Ill. 132, 138, 139, 147 N. E. 797; *Main Motor Coaches* v. *Public Utilities Commission*, 125 Me. 63, 65, 130 Atl. 866".

Stephenson v. *Binford, supra.*

On this point the South Carolina Supreme Court used the following language:

"It must be conceded, as has been held in *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, that even though an exemption operates as a discrimination it is not necessarily invalid; and, also, as is generally held, that a classification or discrimination should be allowed to stand unless it is entirely arbitrary. Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying. As pointed out in the Woodring case, there is a practical difference between such use of the highways and that made by the respondents in this case, "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers", the Court holding, as we have seen, that the Legislature in making its classification was entitled to consider frequency and character of use, etc. In addition, there is this material consideration, that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare.

We think the respondents have failed to sustain the burden cast upon them of showing beyond a reasonable doubt that the exemption in question renders the act unconstitutional and invalid."

This language is substantially identical with that used by this Honorable Court in the above cited *Baking Company* v. *Woodring* case, as follows:

> "The Legislature knew", said the Court, "that as a matter of fact farm products are transported to town by the farmer, or by a nonexempt 'contract carrier' employed by him. The Legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all 'motor vehicles'. 55 F. (2d) at page 352. And the Court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers', and that of 'a farmer who hauls his wheat or livestock to town once or twice a year'. The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintainance and reconstruction. As the Court said in *Alward* v. *Johnson*, 282 U. S. 509, 513, 514, 51 S. Ct. 273, 274, 75 L. ed. 496, 75 A. L. R. 9: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough'. See also *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 82, 50 S. Ct. 204, 74 L. ed. 704, 68 A. L. R. 194".

It is apparent that the case of *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. ed. 1264, may be distinguished from the case at bar as it was by the Supreme Court, in that the exemptions there ran in favor of any "transportation company" hauling the class of products therein mentioned, whereas in the case at bar the discrimination is limited not only by the class of products in question but by the occupation of those engaged in hauling said products, to-wit: farmers and dairymen and lumber haulers. It is obvious that the distinction in favor of a class of carriers, such as farmers and dairymen, is a valid distinction, and is based upon practical considerations as well as fundamental principles of public policy as was indicated in the foregoing decision of this Honorable Court.

II.

The points sought to be raised by the answer (Par. 7) and also in the statement as to the jurisdiction, in regard to (*a*) cargo insurance, and (*b*) in regard to the commission being charged with the duty to regulate the rates and fares of appellant and others in like situation, may be sufficiently disposed of by reason of the fact that there was no showing that the Commission had ever undertaken to enforce the said provisions of the Act as against the appellant or others in like situation—in fact it was conceded in the Answer (see Par. 7) that the Commission had never undertaken to regulate appellant's rates or charges.

> "So far as appears no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain."
>
> *Stephenson* v. *Binford*, 77 L. ed. 203 at 214; U. S. Supreme Ct. Adv. Opinions No. 4.

Moreover, as to the matter of cargo insurance the Supreme Court of South Carolina specifically held (see Part 2 of the Opinion) that the said section of the Complaint (8511) with regard to cargo insurance did not apply to the appellant and did not authorize the Commission to require the appellant to furnish such cargo insurance.

It is established by authorities too numerous to mention that the decision of the State Supreme Court construing a State statute will be accepted as final and conclusive by this Honorable Court, and hence this decision of the South Carolina Supreme Court removes the grounds of this complaint against the statute.

III.

As to the point which we assume is intended to be made by Point 3, to the effect that under Section 8512 of the Act the license fees are based wholly on carrying capacity, it is submitted that it is sufficient to point out that this point was not raised by the appellant's answer, and hence should not be considered by this Court, under the established principle that constitutional objections must be raised at the first opportunity.

The point, however, was raised by argument in the State Supreme Court and was, it is submitted, manifestly properly disposed of by the South Carolina Supreme Court in its decision in Part III thereof.

In regard to this the South Carolina Supreme Court said:

> "We have made a careful examination of the authorities with reference to this particular contention and think it is without merit. Such fees are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use. Further, they are reasonable as to amount and tend to contribute

to the protection of the highways. We do not think that the provision of the act here complained of constitutes an undue burden on interstate commerce."

It is submitted that this decision of the South Carolina Supreme Court is fully supported by the above cited and many other decisions of this Honorable Court.

> "A State which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick* v. *Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; *Kane* v. *New Jersey*, 242 U. S. 160, 167, 71 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly."
>
> *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105.

It is settled that the State may impose taxes upon the intrastate operations of a motor carrier though such motor carrier is also engaged in interstate operations.

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245, 72 L. ed. 551.

In a case of this sort the burden is upon the plaintiff to show that in actual practice the tax operates to deprive him of his constitutional rights.

See *Interstate Busses Corporation* v. *Blodgett, supra.*

As was said by the Court in the above cited Continental Baking Case the court should exclude "from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed".

Advance Op. 76 L. ed., p. 826.

The Federal Supreme Court must indulge the presumption until the contrary is made to appear that the state will not so construe or enforce the order as to interfere with or obstruct such commerce. Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372; *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 369, ante, 265, 274, 35 Sup. Ct. Rep. 99.

Michigan C. R. Co. v. *Michigan R. Commission,* 236 U. S. 615, 35 Sup. Ct. Rep. 422, 59 L. ed. 750, at page 758.

IV.

As to the point sought to be raised by this point, 5(*c*), it is submitted it is sufficient to point out that this point was not raised in the Answer nor presented in any form to the South Carolina Supreme Court. Indeed this alleged point was beyond the scope of the issues in this case since the suit itself was brought, as was stated in the petition (Par. 7) for the purpose of enforcing the Motor Regulatory Act of 1932 (8507 through 8530, Chap. 162 of the 1932 Code), and did not in any way relate to the Act mentioned in said point, to-wit: Section 897 of the 1932 Code, which was the General Appropriation Act for that year.

The point suggested in point 4(*b*) as to the tax upon the gross receipts covering interstate as well as intrastate business, related solely to the appeal in the Blalock case (see Assignment of Error IV), hence need not be considered by this Court in this case in view of the abandonment of the appeal in the Blalock case.

For the foregoing reasons it is respectfully submitted that the appeal in this case should be dismissed and/or

the judgment of the South Carolina Supreme Court affirmed.

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For the State of South Carolina.

Columbia, S. C.
26 August, 1933.